SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION

TENTATIVE RULINGS

EVENT DATE: 08/13/2018 EVENT TIME: 08:20:00 AM DEPT.: 43
JUDICIAL OFFICER: Kevin DeNoce

CASE NUM: 56-2016-00487048-CU-PA-VTA
CASE TITLE: WILKINSON VS. REAL

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Auto

EVENT TYPE: Motion to Strike - Defendant Joseph Spina's Supplemental Designation of Expert Witnesses
CAUSAL DOCUMENT/DATE FILED:

This case has been assigned to Judge DeNoce for all purposes. The morning calendar before Judge Kevin G. DeNoce will begin at 9 a.m. in courtroom 43. Cases including *ex parte* matters will not be called prior to 9 a.m. Please check in with the courtroom clerk by no later than 8:45 a.m. If appearing by Court Call, please call in between 8:35 and 8:45 a.m.

If you wish to submit on the court's tentative decision, please send an email to the court at: Courtroom43@ventura.courts.ca.gov stating that you submit on the tentative, and copy all counsel/parties on your email. Do not call in lieu of sending an email. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

For general information regarding Judge DeNoce and his courtroom rules and procedures, please visit: http://www.denoce.com

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Plaintiff Derek Alan Wilkinson's Motion to Strike Defendant Joseph Spina's Supplemental Designation of Expert Witnesses.

The court's tentative ruling is as follows:

Threshold Procedural Issue:
Prior to the court reaching the merits of Plaintiff's Motion to Strike Defendant's Supplemental Designation of Expert Witnesses, there is an unaddressed procedural issue that the court is concerned with and the parties need to address. Plaintiff filed a request for dismissal of his entire Complaint with prejudice, which dismissal was entered by the Clerk; (ii) the "amended" request for dismissal filed by Plaintiff on July 24, 2017, may not have the legal effect of reviving Plaintiff's dismissed claims; and (iii) Plaintiff has never brought a motion seeking an order vacating Plaintiff's dismissal of his entire Complaint, and the Court has never issued any order vacating that dismissal. As a result, there is a serious issue as to whether Plaintiff's claims are pending at this time and proceeding to trial or any further without resolving this issue could build error into this action.

The problem here is that although Plaintiff can unilaterally seek dismissal of his claims (i.e., by filing an appropriate request for dismissal with the Clerk), he lacks the power to unilaterally reinstate claims that have already been dismissed. There is no authority for the proposition that, merely by filing an amended request for dismissal of his claims, Plaintiff can reinstate claims that have already been dismissed. Plaintiff's appropriate remedy was to timely file a

motion for relief from his inadvertent dismissal of his Complaint pursuant to Code of Civil Procedure §473(b), and obtain a court order vacating that dismissal. However, Plaintiff failed to bring such a motion.

Although this might seem likely a technical point, the court is concerned with the effect it may have on this case. At this juncture, the court's view is that unless and until that dismissal is set aside, Plaintiff may have no right to seek any relief (other than relief from the dismissal) from the Court. **If either party is troubled by the court raising this issue, the** court's response is that the court should not have had to raise this issue. Either counsel for Plaintiff should have filed a motion for relief, or, counsel for Defendant should have spotted this issue and raised it earlier.

Merits of Plaintiff's Motion to Strike Defendant's Supplemental Expert Designation

Assuming that Plaintiff unilaterally, or the parties collectively, can resolve the above procedural issue, only then would it be appropriate to reach the merits of Plaintiff's motion. This motion may need to go off calendar for such resolution and the parties are invited to email the court as to whether the hearing set for 8/13/18 should go forward.

Should the court reach the merits of the motion, the court's intended ruling is as follows. Defendant Spina contends that Plaintiff filing his motion with the Court is improper because such a motion must be made to the "trial court." Specifically, Spina relies on Code of Civil Procedure §2034.300, which provides that:

"Except as provided in Section 2034.310 and in Articles 4 (commencing with Section 2034.610) and 5 (commencing with Section 2034.710), on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:
(a) List that witness as an expert under Section 2034.260.
(b) Submit an expert witness declaration.
(c) Produce reports and writings of expert witnesses under Section 2034.270.
(d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410)."

Spina argues that the reference to "***trial*** court" (i.e. as opposed to "court" alone) in this provision indicates that any motion made pursuant to the provision must be ruled on by the judicial officer actually conducting a trial of the case (e.g., in motions in limine or by ruling on objections made at trial).

The Court finds that Plaintiff's present motion is subject to the requirements of §2034.300. Second, implicit in Spina's argument is the assumption that this Court will not necessarily be conducting the trial of this action. However, this Court considers this case to be assigned to it "for all purposes." Additionally, Spina's contention that §2034.300 requires that a motion to exclude expert testimony for failure to comply with the expert designation requirements must be made to the ***trial*** court is a colorable argument because §2034.300 makes specific reference to "the ***trial*** court," in contrast to most provisions of the Discovery Act that merely refer to "the court" generally. (*See, e.g.,* Code of Civil Procedure §2031.310, subdivisions (f) – (j) [repeatedly referring to "the court" rather than the "the trial court"].) However, Spina's argument that the motion must be made to the court actually conducting the trial of the action fails because the California Supreme Court has held that a court can make a determination of whether expert testimony should be excluded even at the summary judgment stage. (See *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 538.) As a result, there can be no strict requirement that such a determination be made by the trial judge.

Plaintiff contends that the Supplemental Designation should be stricken on the grounds that (i) Spina's designated expert Elevate Services is a company, not an individual, and Spina improperly failed to designate an individual from Elevate Services or give his hourly rate; (ii) it was improper for Spina to include Elevate Services in his Supplemental Designation because Plaintiff has not designated a corresponding expert; (iii) it was improper and cumulative for Spina to designate Elevate Services on the issue of medical billing because Spina already retained Dr. Geoffrey Miller to opine on this issue; (iv) it was improper for Spina to include Dr. Solomon in his Supplemental Designation because Plaintiff did not designate a biomechanical expert; and (v) Spina's Supplemental Designation violates the holding in *Fairfax v. Lords* (2006) 138 Cal.App.4th 1019, because both experts should have been set forth in Spina's original expert designation.

Plaintiff's ground (i) above appears to have technical merit. Code of Civil Procedure §2034.260(b)(1) requires that an expert designation include "[a] list setting forth the name and address of ***a person*** whose expert opinion that party expects to offer in evidence at the trial." [Emphasis added.] As a result, Spina apparently was required to give the

name(s) of the actual person (or persons) from Elevate Services who Spina intended to have testify at trial, not just the name of the company. As a result, Spina's designation of Elevate Services as an expert was deficient. Furthermore, §2034.260(c)(5) requires the expert declaration accompany a disclosure contain "[a] statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney. The expert declaration by Spina's counsel Timothy Fithzhugh that accompanied Spina's Supplemental Designation merely states that Elevate Services "fee for proving testimony ... varies between $275 and $400 [per] hour, with trial testimony between $275 and $400 per hour with a four hour minimum." (*See* Decl. of Plaintiff's Counsel John Ksajikian, ¶8; Exh. D [Supplemental Expert Designation], attached Fitzhugh Decl., ¶9.) This statement of a range of potential rates does not comply with the requirement that the actual rates be stated, and therefore Fitzhugh's declaration is deficient in this respect.

These deficiencies collectively, constitute a sufficient ground for excluding Spina from presenting any expert testimony from employees of Elevate Services at trial. However, the Court need not rely on these deficiencies alone, as ground (iii) (addressed below) provides an additional (and perhaps somewhat stronger) reason to exclude any expert testimony from any Elevate Services employee.

Ground (ii) above lacks merit. Plaintiff is generally correct that it would be improper for Spina to make a supplemental designation of an expert who would testify on a ***subject*** that Plaintiff's designated experts would not be testifying on, as §2034.280(a) only allows supplemental designations of experts "who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange." However, nothing in this requirement requires that Spina's supplementally designated expert have the same title or qualifications as Plaintiff's originally designated expert: rather, it is the subject matter of the testimony that is critical. Here, Plaintiff's counsel Erik Zograbian's expert declaration submitted in support of Plaintiff's original Expert Designation indicated that Plaintiff's expert Cary Alberstone would include, *inter alia*, "the reasonableness and necessity of Plaintiff's medical expenses to date" (*see* Ksajikian Decl., ¶5; Exh. B [Plaintiff's Expert Designation], attached Zograbian Decl., ¶5.b), and this is the same subject matter indicated in Spina's Supplemental Designation for expert testimony from Elevate Services employees. (*See* Ksajikian Decl., ¶8; Exh. D [Supplemental Expert Designation], attached Fitzhugh Decl., ¶8.) Accordingly, the subject matter of Elevate Services does not exceed the subject matter of expert testimony set forth in Plaintiff's Expert Designation.

Ground (iii) above has merit. Section 2034.280(a) indicates that a supplemental expert designation may only be made "if the party supplementing an expert witness list has not previously retained an expert to testify on that subject." Here, Spina's original Expert Designation designated Dr. Geoffrey Miller, and the expert declaration in support of Spina's Expert Designation indicated that Dr. Miller would testify on, *inter alia*, the "necessity of Plaintiff's medical treatment; [and the] reasonableness of Plaintiff's medical bills." (*See* Decl. of Plaintiff's Counsel John Ksajikian, ¶6; Exh. C [Spina's Original Expert Designation], attached Fitzhugh Decl., ¶4.) Because Spina already designated an expert to testify on the subject of the necessity and reasonableness of Plaintiff's medical bills, he is not entitled under §2034.280(a) to make a supplemental designation of additional experts to testify on these same subjects. Accordingly, the Court's intent is to exclude any expert testimony from Elevate Services from trial.

Ground (iv) above appears to lack merit. In his Expert Designation, Plaintiff designated two experts to testify as to "accident reconstruction" issues: namely, (i) Marc Hammerstrom (an automobile collision reconstruction expert), who was expected to testify "concerning his analysis and reconstruction of the accident, including his analysis of time, speeds, distance, causation, forced of impact, applicable standard of care, and breach [of] defendant's duties" (*see* Ksajikian Decl., ¶5; Exh. B [Plaintiff's Expert Designation], attached Zograbian Decl., ¶3.b); and (ii) Mark Burns (an accident reconstruction and human factors expert) who was expected to testify as to:

> *"(1) reconstruction of the collision; (2) Human factors including but not limited [to] human sensory* perception, abilities and information processing as it relates to the Liability of Defendants; (3) Damage to the vehicles; (4) breach of the Defendants' duties; (5) applicable standards of care; (6) causation; and (7) all other issues related to categories (1) through (6)."
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> (*Id.* at Ksajikian Decl., ¶4.b.)

These description of these two accident reconstructions experts' anticipated testimony – and in particular the "all other issues related to" language in category (7) of the description of Mark Burns' anticipated testimony – appears broad enough in subject matter to include Spina's expert Dr. Solomon's testimony as to "aspects of the subject accident, from an accident reconstruction, biomechanical or human factors perspective," particularly since the scope of such testimony is expressly limited to matters "which are the subject of testimony to be provided by Plaintiff's designated experts Mark

Hammarstrom ... and/or Mark Burns...." (*See* Ksajikian Decl., ¶8; Exh. D [Supplemental Expert Designation], attached Fitzhugh Decl., ¶4.) Accordingly, Dr. Solomon's anticipated testimony does not exceed the subject matter of that stated for Plaintiff's own accident reconstruction experts.

Finally, as to ground (iv) above, The *Fairfax* Court held that, with respect to "issues that both sides anticipate will be disputed at trial, a party cannot merely 'reserve its right' to designate experts in the initial exchange, wait to see what experts are designated by the opposition, and then name its experts only as purported 'rebuttal' witnesses." (*Fairfax v.* Lords (2006) 138 Cal.App.4th 1019, 1021.) Here, Plaintiff argues that Spina should have reasonably anticipated that Dr. Solomon's accident reconstruction testimony would be necessary because Spina knew, at the time he made his original Expert Designation, that there was a dispute as to liability in this action and therefore should have anticipated that accident reconstruction and human factors experts would be needed. However, Spina's counsel Fitzhugh states facts in his declaration attached to Spina's Opposition Brief stating the facts (including that there was a single car involved in the accident, no marks on the car resulting from the accident, no photographs of the accident scene or vehicle, no physical evidence of the movements of the vehicle or its contact with Plaintiff) which apparently initially dissuaded Spina's counsel from naming an accident reconstruction expert. (*See* Fitzhugh Decl., ¶3.) Although Spina's counsel may arguably have been negligent in failing to originally name an accident reconstruction expert, the evidence does not appear to suggest that it was part of a deliberate strategy by Spina's counsel to delay providing expert information to Plaintiff. And mere negligence appears to be an insufficient basis to invalidate a supplemental expert designation under *Fairfax*:

"At oral argument, Barboni cited to Fairfax v. Lords (2006) 138 Cal.App.4th 1019 [41 Cal. Rptr. 3d 850] in support of her position. In that case, the defendant served a demand for the exchange of expert witness information, and the plaintiff timely designated a retained expert. He also stated that he reserved his right to call any treating physicians as witnesses. On the same date, the defendant served a document that purported to be a designation of expert witnesses, but contained no such information. Instead it stated that defendant ' "hereby gives notice that he is not designating any retained experts for the first exchange of expert witness information." He went on to state, however, that he "expressly reserves the right to designate experts in rebuttal to [the plaintiff's] designations." ' [Citation.] Several weeks later, the defendant issued a second designation of expert witnesses, naming two witnesses designed to counter the plaintiff's expert. [Citation.] He also reserved the right ' "to provide a supplemental designation of experts regarding all issues for which plaintiff designates an expert." ' [Citation.] Over the plaintiff's objection, the court allowed the defendant's experts to testify. [Citation.]

"On appeal, this court held the trial court's ruling was improper. The defendant's initial exchange of information was not in compliance with Code of Civil Procedure former section 2034. 'The effect of [the defendant's] expert designation was to delay his own list of "expected" witnesses until after he had seen the list put forth by [the plaintiff]. [The defendant] does not deny that this was his express intent, and instead argues it is only "prudent" for a defendant to do so.' [Citation.] The court held the defendant's argument was 'simply inconsistent with the clear statutory requirement of a "simultaneous" exchange.' [Citation.]

"This is not the situation here. The Tuomis' late designation of their expert witnesses was not an intentional strategic move to wait to see who Barboni designated-it was the result of error, an explanation the trial court accepted, and which we are not in a position to second-guess, regardless of Barboni's belief that this explanation was untrue. We do not accept the argument that the Code of Civil Procedure's requirement of a simultaneous exchange is subject to so strict an interpretation that it cannot ever give way to situations where excusable neglect occurs. Here, while the exchange was not simultaneous, it was also not crafted by one party to put the other at a disadvantage in designating experts last."

(*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 352-353.)

Here, in the absence of any evidence indicating that Spina's late designation of an accident reconstruction expert was the result of a deliberate strategy of delay – as opposed to Spina's counsel's mistaken belief that there was simply not enough physical evidence regarding the accident to make such an expert useful – the Court declines to apply *Fairfax* to exclude Dr. Solomon's expert testimony.

Based on the above, and only if the Court reaches the substantive merits of Plaintiff's motion, the Court (i) grants Plaintiff's request for an order excluding Elevate Services, Incl.'s expert testimony from trial, on the grounds that Spina fails to provide the name and hourly rate of the person from Elevate Services who is anticipated to testify, and (more critically) that Spina has already designated an expert to testify on the necessity and reasonableness of Plaintiff's medical expenses and therefore is barred by the express language of Code of Civil Procedure §2034.280(a) from

making a supplemental expert designation on the same subject matter; and (ii) deny Plaintiff's request for an order excluding Dr. Kenneth Solomon's expert testimony.